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No. 91-284

In the Supreme Court of the United States

OCTOBER TERM, 1991

MARY E. BARGER, PETITIONER

v.

PETROLEUM HELICOPTERS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g), provides that the rights of a "person entitled to compensation" shall be terminated if the person settles a claim against a third person for less than the compensation payable under the LHWCA without obtaining the employer's prior written approval. The question presented is whether the termination-of-rights provision applies when the person who settles the claim without employer approval is not, at the time of the settlement, receiving compensation from his employer and has not then been determined to be entitled to it.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 74a-86a) is reported at 927 F.2d 828. The panel opinion of the court of appeals (Pet. App. 71a-73a) is reported at 910 F.2d 276. The decision and order of the Benefits Review Board (Pet. App. 65a-70a) and the decision and order of the administrative law judge (ALJ) (Pet. App. 48a-64a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1991. The petition for a writ of certiorari was filed on June 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) requires employers to pay compensation to covered workers and their survivors for work-related injuries that result in disability or death, see 33 U.S.C. 908, 909, and to provide medical services for covered injuries. 33 U.S.C. 907. A "person entitled to * * * compensation" under the LHWCA, however, may also recover damages from a third person. 33 U.S.C. 933(a). If the person does so recover, the employer receives a credit against the LHWCA compensation to the extent of the employee's "net" recovery against the third party (defined as the employee's actual recovery less reasonable expenses including attorney's fees). See 33 U.S.C. 933(f).[1]

Section 33(g)(1) of the LHWCA provides a special rule for cases in which "the person entitled to compensation" settles the third-party action for less than the amount of compensation to which the person would be entitled under the LHWCA. 33 U.S.C. 933(g)(1). In such cases, the employer is liable for the difference between the settlement and the LHWCA compensation due "only if written approval of the settlement is

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[1] The LHWCA also provides a mechanism for an employer that is required to pay compensation to assert the employee's third-party claim if the employee does not. If the employee accepts an award of compensation and does not assert the third-party claim within six months, the employer may, within 90 days thereafter, sue the third person on assignment of the employee's cause of action. 33 U.S.C. 933(b) and (d). From any recovery (net of attorney's fees and costs), the employer is entitled to recoup its payments to the employee and to retain the present value of estimated future compensation payments. See 33 U.S.C. 933(e).

obtained from the employer and the employer's carrier, before the settlement is executed." *Ibid.* In addition,

> [if] no written approval of the settlement is obtained and filed as required by [Section 33 (g)(1)], or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under [the LHWCA] shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under [the LHWCA].

33 U.S.C. 933(g)(2).

2. On April 23, 1976, Walter Barger died while piloting a helicopter in the Gulf of Mexico. His employer, Petroleum Helicopters, Inc. (PHI), and its insurer, American Home Assurance Company, initially paid LHWCA death benefits to Barger's widow, Mary E. Barger. The employer stopped payments on April 17, 1978, when Mrs. Barger filed suit against PHI and the manufacturer of the helicopter under the Jones Act, 46 U.S.C. App. 688.[2] Pet. App. 2a, 49a, 66a.

On September 9, 1980, on the eve of trial, Mrs. Barger and the manufacturer agreed that if a judgment was entered against the manufacturer, it would pay Mrs. Barger $225,000 and waive its right to appeal. Pet. App. 29a n.1, 51a. PHI, which had been

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[2] The Jones Act remedy is limited to "seamen" and is exclusive of the remedy provided by the LHWCA. Thus, if Mrs. Barger was entitled to compensation under the Jones Act, she was not entitled to compensation under the LHWCA. See generally *McDermott Int'l, Inc.* v. *Wilander*, 111 S. Ct. 807, 813-814 (1991) (discussing relationship between Jones Act and LHWCA).

informed of ongoing settlement negotiations, did not approve this agreement. *Id.* at 51a-52a. The trial court awarded a total of $660,368 to Mrs. Barger, apportioned 20% ($132,073.60) against the manufacturer, and 80% ($528,294.40) against PHI, with neither defendant being entitled to contribution or indemnity. *Id.* at 8a, 24a. On PHI's appeal, the Fifth Circuit determined that Mrs. Barger's deceased husband had not been a seaman, and that she accordingly was entitled to relief under the LHWCA rather than the Jones Act. *Id.* at 27a-44a.

3. Following the court of appeals' decision, Mrs. Barger sought renewed compensation from PHI under the LHWCA. See Pet. App. 73a. PHI argued that Section 33(g) protected it from liability because Mrs. Barger had not obtained PHI's prior written approval before entering into her agreement with the manufacturer. Relying on decisions issued by the Benefits Review Board and other ALJs, the ALJ held that Section 33(g) did not require consent because Mrs. Barger was not a "person entitled to compensation" at the time of settlement. Pet. App. 52a-61a. He reasoned that under Section 33(g)(1), as amended in 1984,[3] Congress preserved the established administrative construction of an earlier version of Section 33(g) that a person who is not receiving benefits at the time of settlement is not a "person entitled to compensation" who must obtain an employer's consent. Pet. App. 55a-57a. The ALJ thus found it unnecessary to decide whether Mrs. Barger's agreement with the manufacturer was a compromise or settlement for which approval was required. *Id.* at 61a. The Benefits Review Board affirmed, agreeing

[3] See Pub. L. No. 98-426, § 21(d), 98 Stat. 1652 (1984), adding Section 33(g)(2), quoted at page 3, *supra*.

with the ALJ that Mrs. Barger was not a "person entitled to compensation" at the time she entered her agreement. *Id.* at 65a-70a.

4. A panel of the court of appeals reversed, relying on the reasoning of its previous decision in *Nicklos Drilling Co.* v. *Cowart*, 907 F.2d 1552 (1990), aff'd on reh'g, 927 F.2d 828 (5th Cir. 1991) (en banc), which had held in a similar case that an employer is not liable for the difference between the settlement and LHWCA compensation unless it consents to the third-party settlement, even if the employee was not receiving compensation at the time of the settlement. See Pet. App. 73a; 907 F.2d at 1554-1555.

5. To resolve a conflict with the court's earlier unpublished decision in *Kahny* v. *Director, OWCP*, 729 F.2d 777 (5th Cir. 1984) (Table), the court of appeals granted the suggestions for rehearing en banc filed by petitioner and the Director of the Office of Workers' Compensation Programs,[4] and affirmed the panel decision. Pet. App. 76a, 83a.[5] Applying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court held that Section 33(g) unambiguously requires an em-

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[4] Under Section 39(a) of the LHWCA, "the Secretary [of Labor] shall administer the provisions of this chapter." 33 U.S.C. 939(a). The Secretary has assigned that administrative responsibility to the Director. 20 C.F.R. 802.410(b). See *Director, OWCP* v. *Perini North River Associates*, 459 U.S. 297, 302 n.9 (1983). The Director participated as a respondent in the court of appeals.

[5] The court also granted rehearing en banc in a companion case raising the same issue, *Nicklos Drilling Co.* v. *Cowart*, 907 F.2d 1552 (5th Cir. 1990), and similarly affirmed the decision vacating the Board's order. See Pet. App. 77a, 83a. The claimant's petition for certiorari in that case is pending as *Estate of Cowart* v. *Nicklos Drilling Co.*, No. 91-17.

ployer's prior written approval of settlements for less than the compensation due, whether or not a claimant is receiving LHWCA compensation at the time of settlement. The court therefore refused to defer to the Director's contrary interpretation. Pet. App. 79a-82a.

For three reasons, the court rejected the Director's argument that "[t]he actual payment of benefits * * * is the price which Congress intended employers to pay for the right of prior approval." Pet. App. 78a. First, the court found no textual exceptions to the approval requirement set forth in Section 33. Pet. App. 81a. Second, the court pointed out that Section 33(g)(2) terminates benefits for noncompliance "regardless of whether the employer * * * has made payments or acknowledged entitlement to benefits under this chapter," 33 U.S.C. 933(g)(2); that provision, the court stated, "squarely refutes" the Director's argument that the employer's actual payment of benefits was intended to be the *quid pro quo* for the employer's right of prior approval. Pet. App. 81a. Finally, the court saw no need to accept the Director's reading of Section 33(g) in order to prevent financial hardship to claimants pursuing civil remedies. Any hardship on claimants, the court indicated, was a "self-inflicted" result of their decision "to ignore their rights and responsibilities" under 33 U.S.C. 933(g). Pet. App. 82a.

The court also rejected the Director's claim that his interpretation is necessary to give meaning to the requirement in Section 33(g)(2) that "employees" must notify their employers of "any settlement obtained from or judgment rendered against a third person." 33 U.S.C. 933(g)(2). The Director argued that if the approval requirement were applied to all

settling claimants, including those who were not receiving benefits, the notice provision would be superfluous because the employer would be aware of all settlements from having approved them.[6] The court, however, stated that the quoted phrase in Section 33(g)(2) not only "extends the notification requirement to judgments," but also applies to settlements "for an amount exceeding [a claimant's] LHWCA compensation entitlement." The approval requirement, in contrast, applies only to settlements for less than a claimant's LHWCA compensation entitlement. Thus, the court did not believe that its interpretation rendered the notice requirement superfluous. Pet. App. 82a.

Finding that "Congress has spoken unambiguously" in requiring all employees to obtain prior approval, the court concluded that the Director's interpretation of the statute was not entitled to deference. Pet. App. 83a.

Three judges dissented. Pet. App. 83a-86a. They found the Director's interpretation of "person entitled to compensation" reasonable and entitled to deference. In particular, the dissenters saw no valid reason why an employee who has been denied compensation must "go hat in hand to the employer and request permission to settle his claim"; such a result would serve only to foreclose a legitimate compen-

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[6] The Director argued (C.A. Supp. Br. 19) that Section 33(g) distinguishes between two kinds of settlements for less than the amount of LHWCA compensation: those where a claimant was receiving benefits at the time of settlement and those where he was not. According to the Director, the former class, constituting "person[s] entitled to compensation," is governed by Section 33(g)(1)'s approval requirement; the latter need only satisfy Section 33(g)(2)'s notification requirement.

sation claim. *Id.* at 85a. The dissent also found no evidence that Congress intended to overrule the Director's interpretation when it added Section 33(g)(2) in the 1984 LHWCA amendments; rather, the dissent interpreted Congress's reenactment of the phrase "person entitled to compensation" as approval of the administrative and judicial construction, and agreed with the Director that Section 33(g)(2)'s notification requirement "adds to the force of the Director's construction" by requiring notification but not approval whether compensation is being paid or not. Pet. App. 86a.

ARGUMENT

Estate of Cowart v. *Nicklos Drilling Co.*, No. 91-17, which seeks a writ of certiorari from the same judgment as this petition, also seeks review of the question presented here, whether Section 33(g) of the LHWCA requires an employer's written approval of a third-party settlement for less than the compensation due, even when the employee is not receiving LHWCA compensation.[7] As we discussed in our brief in opposition to the *Cowart* petition,[8] we believe that this issue is not ripe for review at this time. In particular, for the reasons stated in our *Cowart* opposition, we disagree with petitioner's argument (Pet. 23-24) that the court's decision conflicts with *Bethlehem Steel Corp.* v. *Mobley*, 920 F.2d 558 (9th Cir.

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[7] As discussed above, it also is disputed in this case whether Mrs. Barger's agreement with the manufacturer was a "settlement" subject to Section 33(g)'s approval requirement. Although the question presented may be read to include this issue, petitioner presents no argument on it.

[8] We have served a copy of our response in *Cowart* on the parties to this petition.

1990), and *O'Leary* v. *Southeast Stevedoring Co.*, 7 Ben. Rev. Bd. Serv. (MB) 144 (1977), aff'd mem., 622 F.2d 596 (9th Cir. 1980) (Table). See 91-17 Br. in Opp. 9-11. We also question petitioner's assessment of the impact of the court's decision on past, pending, and future LHWCA claimants. See Pet. 24-26; 91-17 Br. in Opp. 11-13.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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